

January 2005

FINANCIAL MARKETS LAW COMMITTEE

ISSUE 69 - PROCEEDS OF CRIME ACT 2002

Analysis Of Whether The Proposed Changes To Part 7 Of The Proceeds Of Crime Act 2002
In The Serious Organised Crime And Police Bill Affect The Legal Uncertainties Identified In
The Financial Markets Law Committee Issue 69

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FINANCIAL MARKETS LAW COMMITTEE

ISSUE 69 - WORKING GROUP ON THE PROCEEDS OF CRIME ACT 2002

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FINANCIAL MARKETS LAW COMMITTEE ISSUE 69 - PROCEEDS OF CRIME ACT 2002

The role of the Financial Markets Law Committee is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed.

Some element of legal uncertainty is inevitable in financial markets. One possible source of legal uncertainty is proposals for new law or regulation. These can sometimes give rise to uncertainties or misunderstandings, if the specific features of wholesale market practice or of the existing framework of law have not been fully understood by a legislator or other public authority.

In the Summer of 2003 an issue arising under the Proceeds of Crime Act 2002 was raised with the Committee. At its meeting on 25 September 2003 the FMLC resolved to address the issue, in the first instance by forming a working group to analyse in detail the nature of the issue. To conduct that analysis in the first instance, the FMLC formed a Working Group. This paper was developed for the Committee by that Working Group. The views set out in this paper, however, are those of the Committee itself, as well as of the Working Group. Phil Wynn Owen took no formal part in the FMLC's discussions on this issue, as he has an official role in the negotiation of the Third Money Laundering Directive.

Remit

Initially the FMLC established a Working Group to explore whether, and, if so, of what nature there is a legal uncertainty in relation to Part 7, The Proceeds of Crime Act 2002 (the "Act" and "POCA"). During the course of this work on POCA the European Commission made a Proposal for a Third Money Laundering Directive ("MLD3")¹. The issues we raise in relation to POCA will also need to be addressed in MLD3 to ensure a clear enforceable pan-European anti-money laundering regime.

Background

The Financial Markets Law Committee (FMLC) published Issue 69 in October 2004. This identified legal uncertainties in relation to Part 7 of the Proceeds of Crime Act 2002 (the "Act" and "POCA"). Since publication of Issue 69 the Home Office has published the Serious Organised Crime and Police Bill which contains amendments to provisions of Part 7 of POCA, which may impact on the analysis in Issue 69. This supplemental paper considers whether the proposed amendments, if enacted, would affect the analysis in Issue 69.

The Serious Organised Crime and Police Bill - relevant amendments to Part 7

¹ Published by the Commission on 30 June 2004.

The amendments may, for the purposes of this supplemental paper, be summarised as follows:

1. No amendment has been made to the definition of criminal conduct. The definition of criminal conduct was identified as a principal cause of the uncertainty in POCA.
2. However a new defence has been proposed to the substantive money laundering offences of concealing criminal property, being concerned in arrangements that relate to criminal property, acquiring, using and possessing criminal property and in the failure to disclose obligation imposed on the regulated sector. In order for a person to avail himself of the defence he must:
 - (i) know or believe on reasonable grounds that the relevant criminal conduct occurred outside the United Kingdom; and
 - (ii) the relevant criminal conduct must not be unlawful under the criminal law of the overseas country or territory; and
 - (iii) the relevant criminal conduct must not be of a description that is prescribed by an order made by the Secretary of State. (No indication has yet been given of the descriptions of criminal conduct that may be prescribed).

Does the Availability of a Defence Affect the Analysis in Issue 69?

For the reasons given below, we have concluded that the new provision does not make a significant difference to the uncertainties identified in Issue 69, and indeed in some cases makes the position for those dealing with overseas persons worse than if they were dealing with UK persons.

The following points can be made about the new approach:

1. A person dealing with a UK person who has breached a licensing requirement which is an offence may have no reason to know or suspect the same, and will not commit a money laundering offence. (Section 340 requires a defendant to have actual knowledge or suspicion that there is criminal property-and criminal property is the result of "criminal conduct". The test is whether the defendant knows or suspects criminal conduct. If he does not, because the conduct is to all appearances legitimate, then he does not commit an offence, even if in fact there has been criminal conduct.)

However, the proposed new defence means that the third party who is considering overseas conduct which is "criminal conduct" because it would be unlawful in the UK - to take the colourful example, bullfighting - has to establish that the conduct of the bullfighter is, as a matter of objective fact, lawful in Spain. The defence would not be available if bullfighting is only legal if the matador meets certain conditions which the matador did not in fact meet - e.g. performing in an unlicensed venue. The only course would be to conduct due diligence as to actual compliance with local law, which would be disproportionate in an "all crimes" scenario, and in many cases could be impossible.

2. It could be said, however, that the defence changes the position from that discussed in Issue 69. This would be on the basis that, instead of considering the definition of criminal conduct and its application, the person instead needs to establish that the conduct is not unlawful overseas and is not of a description prescribed by the Secretary of State. It is only if the person cannot be satisfied as to these conditions that the wider issues become relevant. However, one is generally only concerned with establishing that a defence is available, if there is thought to be the risk of committing an offence. A person would therefore still need to analyse the issues relating to the definition of criminal conduct highlighted in Issue 69. Amongst other things, this requires him to analyse whether conduct overseas would constitute an offence in the United Kingdom if it were to occur here. As identified in Issue 69 there will remain an uncertainty as to whether or not this is subject to a literal interpretation (which would be contrary to the authority in Cox v Army Council).
3. The defence places an obligation on the person concerned to inquire into and definitively establish the criminal law of a foreign jurisdiction. He would have to do so, whether or not the conduct raises public interest issues such as those involved in serious crime, or whether it involves other historic, strict liability or other offences which might not be considered to be of interest to the UK authorities. This appears to raise similar issues of proportionality to those identified in Issue 69.
4. Therefore the definition of criminal conduct remains the prime concern and this has not been changed

Other Issues raised in Issue 69

Issue 69 also identified that the absence of a de minimis threshold in domestic cases gives rise to issues concerning the proportionality of the restrictions and consequent uncertainty. This is due to the fact that conduct which constitutes any UK offence appears to be predicate to money laundering. The proposed amendments in the Bill do not address any of these issues (except in the limited context of applying a threshold amount of £100 for acts done by a deposit taking body in operating a bank account).

Possible approaches for legislative change

It would appear therefore that the proposed amendments do not materially affect the uncertainties identified in Issue 69; whilst the proposed defence may be of some assistance in assessing proportionality, it remains the case that the defence is only available following expenditure of time and resources investigating a foreign criminal law, without regard to whether the conduct or potential money laundering involves serious crime.

The role of the Financial Markets Law Committee is to identify issues of legal uncertainty and to consider how such issues could be addressed - it is not its role to advise or press for any particular change. However, it is suggested that the issues that have been identified could be satisfactorily addressed by changes to the definition of criminal conduct itself, rather than solely by the creation of defences.

In particular, as far as overseas offences are concerned, the issues we have identified might be addressed by limiting the definition of criminal conduct, in respect of conduct that has

occurred overseas, to serious crime (to be defined in an instrument made by the Secretary of State). Such a change would not, however, affect the domestic issues concerning de minimis - the particular issues we identified included the disproportionate reporting obligation and related offences (including the offence of participating in an arrangement). It may be that a more proportionate provision would, in this case, be the inclusion of a defence to the reporting obligation (and the offence of participating in an arrangement) provided that the alleged offender has:

- no reason to believe that the person or an associate is or has been engaged in serious crime; and
- believes on reasonable grounds that the offence concerned is not connected with or part of a scheme or arrangement for laundering the proceeds of serious crime.

This would, for example, remove a reporting obligation on regulated firms in respect of, say, one-off copyright offences, provided that the copyright offence is not believed to be part of a larger criminal enterprise, whilst leaving the prime offender still susceptible to a money laundering charge.

Given the limited time available for amendments to be made to the Bill it may also be appropriate to consider the inclusion of a power in section 340 to vary the types of conduct covered by the definition of criminal conduct by instrument. This would be to enable narrowing of the scope of the definition, rather than to widen it. Thus the amended POCA could retain the current definition of criminal conduct but contain a further provision to the effect that the definition is not to include any conduct (whether in the United Kingdom or elsewhere) which is prescribed for this purpose by an order made by the Secretary of State. There would need to be further provision outlining the nature of the order that could be made by the Secretary of State. This might be a means of reconciling the complexities of the issue with the Parliamentary timetable.

18 January 2005

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